

LEE PIN SENG

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v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR

LEE HUN HOE CJ (BORNEO)

GEORGE SEAH FJ

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SYED AGIL BARAKBAH FJ

[CRIMINAL APPLICATION NO. 17 of 1983]

7 FEBRUARY 1984

CRIMINAL LAW AND PROCEDURE: Charge under s. 420 of Penal Code - Acquittal in Sessions Court at end of prosecution case - Appeal by Public Prosecutor allowed and defence ordered to be called - Application to refer a question of law to Federal Court - Construction of s. 173(f) of Criminal Procedure Code - Case to continue before Sessions Court - Courts of Judicature Act 1964, s. 66(1).

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The applicant and four others were charged in the Kuala Lumpur Sessions Court with an offence under s. 420 of the Penal Code. At the close of the prosecution case on 30 March 1983, the applicant and two others were acquitted on the said charge. Being dissatisfied with the acquittal, the respondent appealed to the High Court. On 23 November 1983, the High Court, applying the principle in *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11 ordered the applicant and two others to make their defence on the said charge.

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The applicant applied to the Federal Court for an order pursuant to s. 66 of the Courts of Judicature Act 1964 regarding the provisions of s. 173(f) of the Criminal Procedure Code (CPC). Counsel for the applicant argued that s. 173(f) is actually not similar to s. 188 of the Singapore CPC and that *Haw Tua Tau's* case is not applicable to summary trials in the Subordinate Courts in this country.

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Held:

[1] Although s. 173(f) of the CPC may not be word for word the same as s. 188 of the Singapore CPC, nevertheless the effect is the same.

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[2] The application is premature. The case should continue before the President of the Sessions Court. Only after he has determined the case, after fully considering Counsel's submission on the evidence and the law, and, if there is an appeal, after the High Court Judge has given his views on all the points raised, will the Federal Court consider points of law of public importance that may be referred under s. 66(1) of the Courts of Judicature Act 1964. (*Cecil Rajah v. Public Prosecutor* [1981] CLJ (Rep) 41 followed).

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[Application dismissed.]

Cases referred to:

Haw Tua Tau v. Public Prosecutor [1981] 2 MLJ 49; [1981] 3 WLR 395; [1981] CLJ (Rep) 11

A. Ragunathan v. Pendakwa Raya [1982] 1 MLJ 147; [1982] CLJ (Rep) 63

Cecil Rajah v. Public Prosecutor [1981] 1 MLJ 147; [1981] CLJ (Rep) 41

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Legislation referred to:

Courts of Judicature Act 1964, s. 66(1)

Criminal Procedure Code, s. 173(f)

Criminal Procedure Code, (Amendment) Act 1976 (Singapore), s. 188

Penal Code, s. 420

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- a* For the applicant - G. Sri Ram; M/s Sri Ram, Zulkifly & Kumar
For the respondent - Fong Seng Yee; SFC

JUDGMENT

Lee Hun Hoe CJ:

- b* The applicant and four others were charged in the Kuala Lumpur Sessions Court with an offence under s. 420 of the Penal Code. At the close of the prosecution case on 30 March 1983 the applicant and two others were acquitted on the said charge. Being dissatisfied with the acquittal the respondent appealed to the High Court. On 23 November 1983, after hearing arguments, the High Court ordered the applicant and two others to make their defence on the said charge. The learned Judge took the view that the learned President was wrong to
- c* acquit the applicant and two others while calling on two other accused to make their defence on substantially the same evidence. Instead of appealing against the decision of the learned Judge, the applicant applied to this Court for an order pursuant to s. 66 of the Courts of Judicature Act regarding the provisions of s. 173(f) of the Criminal Procedure Code which reads:

- d* If, upon taking all the evidence herein before referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

- The learned Judge applied the principle in *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11, a decision of the Privy Council which was followed by this Court in *A. Ragunathan v. Pendakwa Raya* [1982] CLJ (Rep) 63. *Haw Tua Tau's* case makes clear that at the close of the prosecution case the learned President of the Sessions Court had to determine as a
- e* question of law whether on the evidence as adduced, and unrebutted, the accused would lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. In *Haw Tua Tau's* case the Privy Council was commenting on s. 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976 which is similar to our s. 173(f).

- f* Applicant submitted that our s. 173(f) is actually not similar to the Singapore s. 188 and that it is not applicable to summary trial in our Subordinate Courts. He cited a few local authorities to show conflict. It is his submission that one should not follow *Haw Tua Tau's* case.

- We agree with the respondent that although our s. 173(f) may not be word for word the same as the Singapore s. 188 nevertheless the effect is the same. The application is premature.
- g* There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now. Section 66(1) of the Courts of Judicature Act provides that:

- When an appeal from a decision of a subordinate Court in a criminal matter has been determined by the High Court, the Federal Court may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of
- h* any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.

- In *Cecil Rajah v. Public Prosecutor* [1981] CLJ (Rep) 41 where the facts are quite similar in that the applicant was acquitted by the Sessions Court at the end of the prosecution case and on appeal by the respondent the High Court allowed the appeal and ordered the defence

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to be called. Thereupon, the applicant applied for certain questions of law of public interest to be reserved for the determination of this Court. Concluding the judgment of the Court, Suffian, then Lord President, observed:

We are of the opinion that in the circumstances of this case the most convenient procedure should be followed, namely that we should uphold the learned judge's order dismissing the application, so that the case should continue before the President of the Sessions Court. Only after he has determined the case, after fully considering Counsel's submission on the evidence and the law, and, if there is an appeal, after the learned High Court judge has given us the benefit of his views on all the points raised, will it be convenient for us to consider such points of law of public importance that may be referred to us by him under s. 66(1).
We did not think we should interfere with the decision of the learned Judge. The trial should continue before the learned President. We would dismiss the application.

Also found at [1985] 2 CLJ 454

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